Indah Desa Saujana Corp Sdn Bhd & Ors v James Foong Cheng Yuen & Anor

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO D 1–2 1–54 OF 2005
VINCENT NG J
23 NOVEMBER 2005

Civil Procedure — Execution — Writ of seizure and sale — Payment of judgment sum — Whether must be paid into court or directly to judgment creditor — Rules of the High Court 1980 O 46

Civil Procedure — Government proceedings — Suit against government — Whether government could be made liable vicariously by wrongful acts of a judge — Doctrine of separation of powers applied

Civil Procedure — Judge — Suit against judge — Immunity — Whether immunity extend to administrative acts of judge while out of Malaysia — Courts of Judicature Act 1964 s 14

Civil Procedure — Judge — Suit against judge — Whether judge a government servant — Whether government could be made liable vicariously by wrongful acts of a judge — Doctrine of separation of powers applied

Civil Procedure — Judge — Suit against judge — Whether judge could be represented by the Attorney General or its officers to defend the suit — Whether Attorney General duty bound under the Constitution to represent a judge in an action against him

The first defendant was a judge and the head of the Civil Division of the Kuala Lumpur High Court and the second defendant, the Government of Malaysia, was sued as the employer principal of the first defendant. The plaintiffs had on 25 October 2002, in its case in the commercial division, obtained judgment in default against the judgment debtor, Public Bank Bhd — this judgment was subsequently stayed on 18 November 2002. Pursuant to the judgment, the plaintiffs on 13 November 2002 issued a writ of seizure and sale against the properties of the Public Bank Bhd. The first defendant was contacted while he was on leave in Singapore, and he directed the Senior Assistant Registrar to allow and accept payment by Public Bank Bhd into court, against the plaintiffs' instructions to pay the money to them directly. The execution was stopped but Public Bank's cheque was returned, thus no payment was made into court. The plaintiffs claimed that the first defendant had wrongly interfered with the process of justice and execution and wrongly induced the employees of the second defendant to accept Public Bank's cheque; therefore, the plaintiffs held the defendants to account for their loss in having allowed Public Bank to play for time and delay the encashment of the banker's cheque. The defendants applied to strike out the plaintiffs' writ and statement of claim under O 18 r 19(1) of the Rules of the High Court 1980 ('the RHC'), while the plaintiffs applied to

restrain and prevent the Attorney General ('AG') or any of its officers from representing the first defendant.

Held, striking out the action with costs:

(1) Since the first defendant was sued as a judge and not in his personal or private capacity and the second defendant was sued vicariously for the act of the first defendant, the plaintiffs' resistance to the AG's representation of the first defendant was wholly untenable (see para 11). Furthermore, since the first defendant at the material time of his act, was a judge and head of the Civil Division, it would be unjust and improper at this pre-determination stage to debar the AG and his officers from representing the judge in this civil suit (see para 18).

(2) The AG is duty bound under the Constitution to represent a judge in an action against him arising out of not only his judicial act, but also in cases where he has acted in the performance of — or in good faith believed himself to be performing – the judicial duties that he is required to carry out by reason of his position as a judge, in which case he ought to be deemed to have acted judicially (see para 24).

(3) The plaintiffs were wrong to maintain that all monies collected by the sheriff pursuant to a writ of seizure and sale must be paid directly to them by the judgment debtor, Public Bank Bhd. Though O 46 of the RHC uses the expression 'writ of execution or distress', yet it clearly postulates that all payments on judgment sums must always be into court and this includes all monies collected by the sheriff pursuant to a writ of seizure and sale (see para 34). Therefore, the banker's cheque was rightly made in favour of the SAR of the Kuala Lumpur High Court and accepted by the sheriff, rendering the writ of seizure and sale process unnecessary (see para 36).

(4) By filing the writ of seizure and sale, the plaintiffs were attempting to steal a march on the expected application by Public Bank for a stay of the judgment in default which was granted on 18 November 2002. As of now, no judgment sum was due from Public Bank as the same had been set aside by the High Court, though appealed against. Thus the plaintiffs had treated the concept of justice and the judiciary with utter contempt when they instituted this suit, where they would not even yield to any benefit of the doubt against a senior judge of the High Court. Therefore, the principle of 'legitimate expectation' cannot apply in their favour (see para 39).

(5) Section 14 of the Courts of Judicature Act 1964 ('the CJA') and common law afford complete immunity and protection to a judge from all civil liabilities for all judicial acts in cases registered or presided over or assigned to be dealt with by him. This immunity is extant even if the judge had acted 'under some gross error, or ignorance, or (his act) was actuated by envy, hatred and malice, and all uncharitableness' or he is 'shown to have acted so perversely or so irrationally that what he did should not be treated as a judicial act at all'. The remedy is his removal from office rather than to sue him in a private action which would not be in the public interest as judges should be able to do their

work in complete independence and free from fear in having perpetually ask the question: 'If we do this shall we be liable in damages?' (see para 58).

(6) Therefore, the immunity accorded to judges under s 14 of the CJA and the common law should extend to all administrative acts and duties that the judge is required to perform from time to time (see para 59(a)). Upon a broad-spectrum construction of the words 'for any acts done or ordered by him to be done in the discharge of his judicial duty, whether or not within the limits of jurisdiction … provided that he at that time in good faith believed himself to have jurisdiction to do …' in s 14 of the CJA, such immunity should extent to and cover administrative acts of the judge while out of Malaysia provided that it involves an administrative act which the judge is expected to do or assigned to perform while in Malaysia (see para 59(b)).

(7) The plaintiffs' case against the second defendant was a serious affront against the doctrine of the separation of powers vis-à-vis the executive, the legislature and judiciary in a constitutional system. It is beyond question that a judge is not a government servant though he is as much a civil servant. For the court to hold otherwise would be tantamount to the judges themselves slavishly surrendering their judicial independence on high altar of expediency (see para 72).

Obiter

In order to obviate any embarrassment to a judge in having perforce to retain a lawyer from the private field to defend him in a non-criminal case, which would entail the question and propriety of payment for legal services rendered, it is wholly within the ambit of its functions under the Legal Profession Act 1976, in particular s 42(1)(a) for the Malaysian Bar to provide such legal representation should the AG decide not to represent the judge (see para 24).

[Bahasa Malaysia summary

Defendan pertama adalah seorang hakim dan ketua Bahagian Sivil Mahkamah Tinggi Kuala Lumpur dan defendan kedua, Kerajaan Malaysia, telah disaman oleh majikan utama defendan pertama. Plaintif-plaintif telah pada 25 Oktober 2002, dalam kesnya di bahagian dagang, memperoleh penghakiman ingkar terhadap penghutang penghakiman, Public Bank Bhd — penghakiman ini kemudiannya telah digantung pada 18 November 2002. Menurut penghakiman itu, plaintif-plaintif pada 13 November 2002 telah mengeluarkan satu writ sita dan jualan terhadap harta-harta Public Bank Bhd. Defendan pertama telah dihubungi semasa beliau bercuti di Singapura dan beliau telah mengarahkan Penolong Kanan Pendaftar untuk membenar dan menerima bayaran oleh Public Bank Bhd ke mahkamah, terhadap arahan-arahan plaintif-plaintif untuk membayar wang kepada mereka secara langsung. Pelaksanaan itu dihentikan tetapi cek Public Bank Bhd telah dipulangkan, oleh itu tiada bayaran telah dibuat ke mahkamah. Plaintif-plaintif mendakwa bahawa defendan pertama telah salah campur tangan dengan proses keadilan dan pelaksanaan itu dan salah mempengaruhi pekerja-pekerja defendan kedua untuk menerima cek Public Bank, justeru itu, plaintif-plaintif memutuskan defendan-defendan bertanggungjawab terhadap kerugian mereka kerana membenarkan Public Bank

melengah-lengahkan masa dan melewatkan penukaran wang tunai cek itu. Defendan-defendan memohon untuk membatalkan writ dan penyataan tuntutan plaintif-plaintif di bawah A 18 k 19(1) Kaedah-Kaedah Mahkamah Tinggi 1980 ('MT'), sementara plaintif-plaintif memohon untuk menyekat dan menghalang Peguam Negara ('PN') atau mana-mana pegawainya daripada mewakili defendan pertama.

Diputuskan, membatalkan tindakan dengan kos:

(1) Memandangkan defendan pertama disaman sebagai hakim dan bukan dalam kapasiti peribadi atau persendiriannya dan defendan kedua disaman secara vikarius kerana tindakan defendan pertama, tentangan plaintif-plaintif terhadap wakil-wakil PN berhubung defendan pertama sememangnya tidak dapat dipertahankan (lihat perenggan 11). Tambahan pula, memandangkan defendan pertama pada masa matan tindakan beliau, merupakan seorang hakim dan ketua Bahagian Sivil, ia adalah tidak adil dan tidak betul di peringkat pra penentuan untuk menghalang PN dan pegawai-pegawainya daripada mewakili hakim dalam guaman sivil (lihat perenggan 18).

(2) Peguam Negara mempunyai kewajipan di bawah Perlembagaan untuk mewakili seorang hakim dalam satu tindakan terhadap beliau yang bukan sahaja timbul daripada tindakan kehakiman beliau, tetapi juga dalam kes-kes di mana beliau telah bertindak dalam pelaksanaan — atau dalam niat baik mempercayai beliau sendiri mempercayai beliau sedang melaksanakan — kewajipan kehakiman yang beliau dikehendaki melaksanakan disebabkan oleh kedudukan beliau sebagai seorang hakim, yang mana dalam kes tersebut beliau sepatutnya telah bertindak secara adil (lihat perenggan 24).

(3) Plaintif-plaintif salah kerana mengatakan bahawa semua wang yang dikumpulkan oleh sherif menurut satu writ sita dan jualan hendaklah dibayar terus kepada mereka oleh penghutang penghakiman, Public Bank Bhd. Meskipun A 46 KMT menggunakan ungkapan 'writ of execution or distress', namun ia jelas mempostulatkan bahawa semua bayaran untuk jumlah penghakiman hendaklah sentiasa ke mahkamah dan ini adalah menurut satu writ sita dan jualan (lihat perenggan 34). Oleh itu, cek pihak bank telah dibuat dengan betul memihak kepada PKP Mahkamah Tinggi Kuala Lumpur dan diterima oleh sherif, menjadikan writ sita dan jualan itu tidak perlu (lihat perenggan 36).

(4) Dengan memfailkan writ sita dan jualan itu, plaintif-plaintif telah cuba untuk melengahkan satu penggantungan terhadap penghakiman ingkar yang telah diberikan pada 18 November 2002. Buat masa ini, tidak ada jumlah penghakiman yang perlu dibayar daripada Public Bank kerana ia telah diketepikan oleh Mahkamah Tinggi, meskipun telah dirayukan terhadapnya. Oleh itu, plaintif-plaintif telah menganggap konsep keadilan dan kehakiman dengan penghinaan apabila mereka memulakan guaman ini, di mana mereka tidak memperoleh apa-apa kelebihan di sebalik keraguan terhadap hakim kanan Mahkamah Tinggi. Oleh itu, prinsip 'legitimate expectation' tidak boleh digunakan bagi menyebelahi pihak mereka (lihat perenggan 39).

(5) Seksyen 14 Akta Mahkamah Kehakiman 1964 ('AMK') dan common law memberikan kekebalan dan perlindungan mutlak kepada seorang hakim daripada semua liabiliti sivil dan tindakan kehakiman dalam kes-kes didaftar atau ketuai atau dilantik agar dikendalikan oleh beliau. Kekebalan ini masih wujud meskipun hakim tersebut telah bertindak 'under some gross error, or ignorance, or (his act) was actuated by envy, hatred and malice, and all uncharitableness' atau beliau telah 'shown to have acted so perversely or so irrationally that what he did should not be treated as a judicial act at all'. Remedinya adalah agar beliau dilucutkan daripada jawatannya dan bukan dengan menyamannya dalam satu tindakan peribadi yang tidak akan menjadi suatu kepentingan awam kerana hakim sepatutnya dapat melaksanakan tugas mereka dengan kebebasan menyeluruh dan bebas daripada kebimbangan untuk menjawab persoalan 'If we do this shall we be liable in damages?' (lihat perenggan 58).

(6) Oleh itu, kekebalan yang diberikan kepada para hakim di bawah s 14 AMK dan common law hendaklah meliputi semua tindakan pentadbiran dan tanggungjawab yang hakim itu dikehendaki melaksanakan dari masa ke semasa (lihat perenggan 59(a)). Berdasarkan spektrum yang luas, pembentukan perkataan-perkataan words 'for any acts done or ordered by him to be done in the discharge of his judicial duty, whether or not within the limits of jurisdiction … provided that he at that time in good faith believed himself to have jurisdiction to do …'dalam s 14 AMK, kekebalan sedemikian hendaklah meliputi dan merangkumi tindakan-tindakan pentadbiran hakim semasa di luar Malaysia dengan syarat tindakan pentadbiran yang hakim itu perlu laksanakan atau dilantik untuk laksanakan semasa di dalam Malaysia (lihat perenggan 59(b)).

(7) Kes plaintif-plaintif terhadap defendan kedua merupakan satu penghinaan serius terhadap doktrin pengasingan kuasa berbanding dengan eksekutif, badan perundangan dan badan kehakiman dalam satu sistem berperlembagaan. Ia melampaui persoalan bahawa seorang hakim itu adalah pekerja kerajaan meskipun beliau juga pekerja sivil. Jika mahkamah memutuskan sebaliknya akan sama seperti hakim itu sendiri dengan bulat-bulat menyerahkan kebebasan kehakiman mereka agar dapat melaksanakan suatu dengan segera (lihat perenggan 72).

Obiter

Bagi tujuan mengelakkan hakim itu tidak berasa malu kerana perlu melantik peguam daripada bidang swasta untuk membela beliau dalam satu kes bukan jenayah, akan menyebabkan timbulnya soalan dan tuan punya bayaran untuk khidmat guaman yang dikenakan, ia adalah keseluruhannya dalam skop fungsinya di bawah Akta Profesyen Undang-Undang 1976, khususnya s 42(1)(a) di mana Badan Peguam Malaysia memperuntukkan wakil undang-undang sekiranya PN memutuskan untuk tidak mewakili hakim (lihat perenggan 24).]

Notes

For cases on execution of writ seizure and sale, see 2(1) *Mallal's Digest* (4th Ed, 2004 Reissue) paras 2487–2498.

For cases on suit against government generally, see 2(1) *Mallal's Digest* (4th Ed, 2004 Reissue) paras 2530–2544.

For cases on suit against judge generally, see 2(1) *Mallal's Digest* (4th Ed, 2004 Reissue) paras 3360–3370.

Cases referred to

Allen & Ors v Jambo Holdings Ltd & Ors [1980] 2 All ER 502 (refd)

Ambard v Attorney General [1936] AC 322 (refd)

Andersen v Gorrie [1895] CA 668 (refd)

Anowar Hussain v Ajoy Kumar AIR 1965 SC 1651 (refd)

Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd [1993] 3 MLJ 36 (refd)

Boonsom Boonyanit v Adorna Properties Sdn Bhd [1995] 2 MLJ 863 (refd)

Drummond-Jackson v British Medical Association [1970] 1 All ER 1094 (refd)

FM v Singer [2004] EWCA 793 (refd)

Gabriel Peter & Partners (suing as a firm) v Wee Chong Jin [1998] 1 SLR 374 (refd)

Gallo v Dawson [1988] 82 ALR 401 (refd)

Haji Hussin bin Haji Ali & Ors v Datuk Haji Mohamed bin Yaacob & Ors [1983] 2 MLJ 227 (refd)

Indian National Congress (1) v Institute of Social Welfare & Ors [2002] 2 LRI 709 (refd)

Moll v Butler [1985] 10 Fam LR 544 (refd)

Nakhla v McCarthy [1978] 1 NSLR 291 (refd)

PP v Wong Kim Fatt [1991] 3 CLJ 2188 (refd)

Pengiran Othman Shah bin Pengiran Mohd Yusoff & Anor v Karambunai Resorts Sdn Bhd (formerly known as Lipkland (Sabah) Sdn Bhd) & Ors [1996] 1 MLJ 309 (refd)

R v Police Commissioner of the Metropolis ex parte Blackburn (No. 2) [1968] 2 QB 150 (refd)

Regan v David Price [2005] California Court of Appeal (refd)

Riches v Director of Public Prosecutions [1973] 2 All ER 935 (refd)

Sevenoaks Securities Ltd & Anor v Clark International Finance NV (1987) Lexis transcript (refd)

Sim Kie Chon v Superintendent of Pudu Prison & Ors [1985] 2 MLJ 385 (refd)

Sirros v Moore [1975] 1 QB 118 (refd)

Taylor v Canada (Attorney-General) [2000] 3 FC 298; [2000] FC Lexis 59 (refd)

Tractors Malaysia v Tio Chee Hing [1975] 2 MLJ 1 (refd)

Tun Dato' Haji Salleh bin Abas v Tan Sri Dato' Abdul Hamid bin Omar & Ors [1988] 3 MLJ 149 (refd)

Yong Tim v Hoo Kok Chong & Anor [2005] 3 CLJ 229 (refd)

Legislation refered to

Constitution Act 1982 [Canada]
Courts of Judicature Act 1964 ss 14(1), 20
Federal Constitution art 145(2)
Legal Profession Act 1976 s 42(1)(a)

Prevention of Corruption Act 1997 ss 14, 15
Rules of the High Court 1980 O 18 r 19(1)(a), (b),(d), O 32 r 10, O 46 rr 17, 21

Darshan Singh (Wan Zainuddin Wan Musa with him) (Darshan Singh & Co) for the plaintiffs.

Dato' Mary Lim Thiam Suan (Pretam Singh, Narkunavathy Sundareson, Mohaji Selamat with her) (Attorney General's Chambers) for the defendants.

Gopal Sreenevasan (Belden Premaraj, Malaik Reza with him) amicus curiae for Bar Council Malaysia.

Vincent Ng J:

[1] Due to the exceptional nature of this case, it is consistent with judicial prudence and the current mood of transparency that I should write a judgment setting out detailed grounds of my decision and delivering the same in open court. This civil suit case is as novel as it is peculiar. Let me put it in stark terms. A judge of the Malaysian High Court ('the first defendant') has been sued for RM24,362,312 with interests and costs and the Malaysian Government ('the second defendant') has also been roped in, so to say, to bear liability as the employer of the judge. The suit which ought to have been filed in the Civil Division of the Kuala Lumpur High Court, was in fact filed in my Commercial Division, presumably because first defendant was, at that material time, the head of the Civil Division. Having filed it in my Division, counsel for the plaintiffs wrote a letter dated 30 May 2005 to the Chief Judge Malaya ('the CJM') requesting that the case be heard by a judge stationed outside Kuala Lumpur. Presumably, since the case was filed in my Division and it found venue in my court through the 'Monday Bundle' system of allotment of cases, the CJM decided, vide letter to counsel dated 12 July 2005, that the case shall be managed and heard by me. This is an eminently correct decision — I need not elaborate save to say that this is a case of grave import in the Nation's history and I have never been found wanting when it comes to taking up an intellectual challenge.

[2] There were originally three applications —

(i) Enclosure 6 — the defendants' application to strike out the plaintiffs' writ and statement of claim ('the SOC') under O 18 r 19(1) of the Rules of the High Court 1980 ('the RHC');

(ii) Enclosure 8 — the plaintiffs' application to restrain and prevent the Attorney General ('AG') or any of his officers from representing the first defendant; and

(iii) Enclosure 10 — the plaintiffs' application to set aside the conditional appearance filed by the defendants.

[3] These applications were fixed for hearing before my senior assistant registrar ('SAR') on 7 July 2005. Due to the complexity of the issues involved in these applications, my SAR, quite rightly, referred these applications to me for adjudication (as judge in chambers) under O 32 r 10 of the RHC.

[4] I promptly required counsel for both parties to appear before me on 18 August 2005 to receive directions on the filing of further affidavits, if required. On that day, so as not to cause any undue delay, I directed that all the applications, including applications that may thereafter be filed, be heard together on the same day with the decision on each enclosure to be delivered in the appropriate sequence, and the subsequent dependent upon the decision on the previous enclosure. This is to obviate the stay or freezing of the determination on other enclosures through appeals on the decision in respect of any one enclosure.

[5] At this juncture, the plaintiffs saw fit to withdraw their application in encl 10. A schedule for handing in written submissions by parties was agreed upon and I fixed the 29 September 2005 for clarification and further oral submissions if desired. This would eliminate the needless interruptions or the necessity for further oral submissions by either counsel immediately before delivery of the judgment.

[6] My secretary received a letter dated 9 September 2005 from the Malaysian Bar to inform this court that:

> Dengan hormatnya kami ingin memaklumkan bahawa Encik Gopal Sreenevasan akan mewakili Majlis Peguam dan hadir sebagai pemerhati (watching brief) pada pembicaraan kes di atas yang telah dijadualkan pada hari Khamis, 29 September 2005 jam 9.00 pagi di Mahkamah Tinggi.

[7] Unfortunately, for some reason, the representative from the Malaysian Bar failed to appear on 29 September 2005, to apply to hold a watching brief. Nevertheless, I decided to invite the Malaysian Bar to participate in the proceedings as amicus curiae, since the present case was the first of its kind in Malaysia, to address this court solely on the ambit of judicial immunity. I fixed 23 November 2005, today, for delivery of my judgment.

[8] I must say that the Commercial Division, housed at the Bangunan Sultan Abdul Samad, does not have a law library and as such, given the complexity of issues in present day litigation, a judge, particularly if he has a limited grounding on the law and its principles, may function properly only by the grace of the keepers of the books and repository of knowledge on the law. No doubt the internet could provide a quick source of legal knowledge. Regardless, at the end of the day, it is not the reading of cold print but the acute intellectual and analytical discourse or debate on the law in fine English between counsel and the judge that breathes life and adds sparkle to the issues for determination.

Plaintiff's Statement of Claim

[9] In an application to strike out O 18 r 19(1) of the RHC, it is important to study the essence of a plaintiff's claim and the language in which the pleadings are crafted (in the instant case, this also applies to the plaintiffs' application in Enclosure 8). For this reason, I propose to set out in extenso the plaintiffs' SOC:

A

1 The plaintiffs were at all material times judgment creditors vide a default judgment dated 25 October 2002 in favour of the plaintiffs against Public Bank Bhd (6463-H) as defendant in the Kuala Lumpur High Court Civil Suit No D2–22–987 of 2002.

B

2

(a) The first defendant was at all material times a judge of the High Court attached to the Civil Division at Wisma Denmark, Jalan Ampang, Kuala Lumpur.

(b) The second defendant is the employer principal of the first defendant and all other administrators, legal and judicial staff including the senior assistant registrar and the bailiffs.

C

3 Pursuant to the said judgment dated 25 October 2002, the plaintiffs issued a writ of seizure and sale vide *Writ of Execution No AE–37–59 of 2002 dated 13 November 2002* against the properties of the said Public Bank Bhd.

D

4 The said defendant, Public Bank Bhd thereupon issued their own *Bankers Cheque No 147363 dated 15 November 2002 for RM14,362,312 in favour of Senior Assistant Registrar, High Court, Kuala Lumpur* in purported accord and settlement and satisfaction of the said writ of execution.

E

5 The plaintiffs requested and required the said Public Bank Bhd to pay the cheque directly to the plaintiffs but the said *Public Bank Bhd refused to do so and directly contacted the first defendant who directed the senior assistant registrar to allow and accept payment by the Public Bank Bhd instead into court.*

F

6 The said senior assistant registrar then informed the two bailiffs of the High Court, Kuala Lumpur, namely: (a) Zainudin bin Ismail; and (b) Mohd Yusuf bin Jamaludin to stop the said execution although the plaintiffs did not agree to do so and the judgment sum together with interests, costs and bailiffs' expenses and commissions were not tendered in full.

G

7 At the said material time there was no stay of execution.

8 Thereafter the said Public Bank Bhd stopped payment and the said bankers cheque drawn on themselves was returned by the Accountant General as 'tidak laku'.

H

9 The plaintiffs aver that a bankers cheque cannot be revoked or stayed or withdrawn and in law is as good as gold and the Plaintiffs had the faith, trust and confidence that it would be honoured.

10 The said Public Bank Bhd also failed to tender or pay the court bailiffs commission of RM287,246.24 for execution expenses, interests and costs despite repeated reminders to do so from the senior assistant registrar.

I

11

(a) The first defendant who is attached to the Civil Division (but the plaintiffs' said case was in the Commercial Division) thereupon as agent, employee and/or *at the request of the officers, solicitors or employees of Public Bank Bhd telephoned the Senior Assistant Registrar, High Court, Kuala Lumpur, namely, Encik Mohammad Nordin bin Abd Rauf, in charge of the matter to accept the said bankers cheque as payment into court.*

(b) The first defendant was obviously allowing the said Public Bank Bhd to play for time and delay the encashment of the bankers cheque.

(c) The plaintiffs have suffered a detriment to their disadvantage as they have a legitimate expectation that in law and on the facts that the bankers cheque would be cleared and the defendants are now estopped from asserting or denying otherwise.

(d) The first defendant must have known that Public Bank Bhd was buying time and had never intended to honour the cheque which in law and in fact could not be stopped or revoked.

(e) The plaintiffs had a legitimate expectation that the bankers cheque will be honoured.

The plaintiffs aver that the actions and omissions of the first defendant have a tendency to cause loss of confidence and damage the integrity of the banking practices and system in the country.

12

(a) The plaintiffs aver that the first defendant had wrongly interfered with the process of justice and execution and wrongly induced the employees, officers and agents of the second defendant *to accept the said cheque* when he had no business, duty, right or responsibility to do so.

(b) The said acts were in breach and contrary to the Judges' Code of Ethics 1994 in particular paragraph 3(1)(a) and (d).

(c) The said acts were also in breach and contrary to s 15 of the Prevention of Corruption Act 1997 (Act 575 – 97).

(d) The said acts were also contrary to s 20 of the Courts of Judicature Act 1964 whereby the first defendant was assigned to the Civil Division of the High Court and to deal with cases only assigned thereto and there was no direction or change of direction for him to deal with cases in the Commercial Division.

(e) The said acts also come within the definition of corrupt practice within s 2(1) of the Emergency (Essential Powers) Ordinance 22 of 1970.

(f) The said acts were also in breach and contrary to the Chief Justice of Malaysia Directive No KHN 156 dated 10 October 1998.

13 The plaintiffs aver that the first defendant made the telephone call to the said senior assistant registrar from Singapore although he was on leave.

14 Thereafter by a letter dated 16 March 2004 the first plaintiff complained to the Chief Justice who replied by letter dated 14 May 2004 that he was investigating the matter but there has been no reply to date

15 The plaintiffs aver that the defendants by their wilful, malicious (intentional), malfeasance and misfeasance, mala fide acts and omissions have caused loss and damage to the plaintiffs and even inflicted unlawful losses on the second defendant itself.

Particulars of Loss	
(a) judgment sum	RM10,000,000.00
(b) damages	RM750,000.00
(c) costs	RM225.00
(d) interests at 8% with effect from 25-10-2002 till realisation	RM15,511,296.00
(e) Bailiffs' commission	RM287,246.24

16 The plaintiffs' claim aggravated, punitive and exemplary damages in the minimum sum of RM10m.

17 The plaintiffs aver that unless the defendants are mulcted in damages, costs and ordered to make good the loss, the public will lose faith and confidence in the administration of justice and in the legal system and rule of law.

18 Whereof the plaintiffs claim judgment for:

(a) RM14,362;

(b) Aggravated, punitive and exemplary damages in the sum of RM10,000,000.

(c) Interests thereon at 8% per annum with effect from 25 October 2002;

(d) costs;

(e) further or other order.

Dated this 14th day of May 2005 (Emphasis added.)

Enclosure 8

[10] I shall first have to deal with encl 8, being the plaintiffs' application for an order of this court to restrain and prevent the AG or any of his officers from acting for the first defendant. The plaintiffs' contention could be summarised thus:

(a) the first defendant's conduct was unrelated to his judicial duties as he was on leave in Singapore and he 'had no business to oversee and direct the senior assistant registrar' on that day;

(b) since the plaintiffs had alleged that the judge had committed corrupt practice, the AG would be 'in a conflict of interest situation 'should the AG act for the judge' as he is also the guardian of public interest'; and

(c) the "first defendant's acts were administrative and ministerial and not judicial.

[11] To take the route of least resistance, I would only have to refer at the plaintiff's assertion that the first defendant is sued as a judge and not in his personal or private capacity and that the second defendant is sued vicariously for the act of the first defendant, to dismiss encl 8 without more. This is so because the very nature of the plaintiffs' pleaded case, to which they are circumscribed, is an affront to common sense and renders their resistance to AG's representation of the first defendant wholly untenable.

[12] I, not one ever know to take the path of least resistance, went on to consider the state of the law in this regard. The AG's functions and duties under the Federal Constitution has been set out under art 145(2) as follows:

> It shall be the duty of the Attorney General to advise the Yang di-Pertuan Agong or the Cabinet or any Minister upon such legal matters, and to perform such other duties of a legal character, as may from time to time be referred or assigned to him by the Yang di-Pertuan Agong or the Cabinet, and to discharge the functions conferred on him by or under this Constitution or any other written law.

[13] With specific reference to this Article, the Federal Court, in the case of *Tun Dato' Haji Salleh bin Abas v Tan Sri Dato' Abdul Hamid bin Omar & Ors* [1988] 3 MLJ 149 held:

> The Attorney General is a public officer under the Constitution. He was required by the rules of procedure of the tribunal to assist the tribunal. *Article 145 of the Constitution properly read gives ample power to the Attorney General to represent the government and any body or person performing any functions under the Constitution.* (Emphasis added.)

[14] It would follow that, as the AG is required to represent the Government and 'anybody or person who perform any functions under the Constitution' he is, indeed, duty bound to represent a judge who performs functions under the Federal Constitution so as to defend and protect the office and the institution of the judiciary in the interest of the administration of justice in this country. See also *Malaysian Bar v Tan Sri Dato' Abdul Hamid bin Omar* [1989] 2 MLJ 281.

[15] I would hold that as the first defendant was, at the material time, head of the Civil Division of the Kuala Lumpur High Court, having charge of all matters pertaining to execution of assets in Kuala Lumpur, including writs of seizure and sale, his duties and functions under O 46 of the RHC would clearly come within the ambit of the phrase 'performing any functions under the Constitution'.

[16] It cannot be gainsaid that a judge who commits any criminal act of corruption or corrupt practice is not immune under s 14 of the Courts of Judicature Act 1964 ('the CJA') from prosecution, and the AG, who is also public prosecutor, should not represent judges in such cases. See *Public Prosecutor v Wong Kim Fatt* [1991] 3 CLJ 2188 and *Regan v David Price* [2005] California Court of Appeal.

[17] Considering that the plaintiffs' contention as in (b) has since been negated and contentions (a) and (c) above on Enclosure 8 is a restatement of the very pith and kernel of the issues for determination in Enclosure 6, which would have to be dealt with in considerable detail, I shall refrain from regurgitating my ratiocination therein which would have the effect of predetermining the defendants' application in Enclosure 6.

[18] Nevertheless, for the present purpose, I would hold that it is now common ground that the first defendant was, at the material time of his act, a judge and head of the Civil Division having charge of all matters pertaining to the execution of assets in Kuala Lumpur, including writs of seizure and sale. As this only leaves the crucial contention, of whether the powers and duties assigned to him by virtue thereof could or should extend to circumstances where he was admittedly on leave in Singapore and whether he believed in good faith that he had jurisdiction for determination, I would hold that it would be unjust and improper at this pre-determination stage to debar the AG and officers of his chambers from representing the judge in this civil suit. For this reason, should this court at all err, it should err on the side of caution.

[19] A regrettable feature of this case is that, on the accusation of corruption, if we are to examine the plaintiffs' pleadings in minute detail, we find a note of farce added thereto. When, on 17 October 2005, this court sought clarification from Mr Darshan Singh on averments 12(c) read with (e) and 12(b) read with (f) of the statement of claim (notably, the defendants are entitled to apply for further and better particulars should they fail in encl 8) he said as follows:

> Averments 12(c) and (e) meant only that the judge had committed a corrupt act by telephoning the Timbalan Pendaftar (Registrar), Encik Nordin. We do not know whether the first defendant had merely responded to a phone call from an officer in K.L. or someone else. *There is no allegation that he (first defendant) had received any monetary or other favours.* (Emphasis added.)

And, added:

> What is meant in averment 12(b) read with (f) is that, where a judge has the slightest interest he cannot make any decision on the matter. At this stage we do not know whether he had any personal interest but *I concede that there is no allegation in any of the Plaintiffs' supporting affidavits or in the pleadings that he had any personal interest in the matter.* (Emphasis added.)

[20] To appreciate the extent of this farce we need to juxtapose the above clarification with the gravity of the language in averments in the relevant sub-paragraphs which read as follows:

12(c) The said acts were in breach and contrary to s 15 of the Prevention of Corruption Act 1997 (Act 575-97);

12(e) The said acts come within the definition of corrupt practice within s 2(1) of the Emergency (Essential Powers) Ordinance 22 of 1970;

12(b) The said acts were also in breach and contrary to the Judges' Code of Ethics 1994 in particular paragraph 3(1)(a) and (d); and

12(f) The said acts were also in breach and contrary to the Chief Justice of Malaysia Directive No KHN 156 dated 10 October 1998.

[21] This is a fortiori considering that para 5 of the SOC concedes that:

The plaintiffs requested and required the Public Bank Bhd to pay the cheque directly to the plaintiffs but the said Public Bank Bhd refused to do so and directly contacted the first defendant who directed the senior assistant registrar to allow and accept payment by the Public Bank instead into court (Emphasis added.)

[22] It is incontrovertible that a bare allegation of corrupt practice, as is the case here, does not place the AG in a conflict of interest situation should he decide to represent the judge. In this regard, it is apposite to recall the words of two great English judges, Lord Atkin in *Ambard v Attorney General* [1936] AC 322 and Lord Denning in *R v Police Commissioner of the Metropolis ex parte Blackburn (No. 2)* [1968] 2 QB 150. This is what Lord Atkin had to say:

The path of criticism is a public way: the wrong headed are permitted to err therein: provided that the members of the public abstain from imputing improper motives to those taking part in the administration of justice, and are genuinely exercising a right of criticism, and not acting in malice or attempting to impair the administration of justice, they are immune. Justice is not a cloistered virtue: she must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men.

[23] I am entirely in agreement with Lord Atkin that the administrators of justice should be allowed to suffer the scrutiny and non malicious criticism of the public as 'justice is not a cloistered virtue'. Perhaps, the perceptive streak in this eminent jurist which inspired the dicta, must have stemmed from his Lordship's belief that if the public and the legal fraternity are barred by curial edit from making fair criticism of judges it may have the adverse effect of encouraging litigation against judges similar to this instant case. In similar vein, Lord Denning MR made the following observation:

All we would ask is that that those who criticise us will remember that, from the nature of our office, we cannot reply to their criticisms. We cannot enter into public controversy. Still less into political controversy. We must rely on our conduct itself to be its own vindication. Exposed as we are to the winds of criticism, nothing which is said by this person or that, nothing which is written by this pen or that, will deter us from doing what we believe is right; nor, I would add, from saying what the occasion requires, provided that it is pertinent to the matter in hand. Silence is not an option when things are ill done.

[24] I would hold that the AG is duty bound (not as a matter of favour) under the Constitution to represent a judge in an action against him arising out of not only his judicial act, in the sense of his act in any case registered with or assigned to or presided over by him, but also in cases where he has acted in the performance of — or in good faith believed himself to be performing – the judicial duties that he is required to carry out by reason of his position as a judge; in which case he ought to be deemed to have acted judicially. In the event, I dismiss encl 8 with costs to the defendants. In any event, it is my considered opinion that in order to obviate any embarrassment to a judge in having perforce to retain a lawyer from the private field to defend him in a non-criminal case, which would entail the question and propriety of payment for legal services rendered, it is wholly within the ambit of its functions under the Legal Profession Act 1976, in particular s 42(1)(a), for the Malaysian Bar to provide such legal representation should the AG decide not to represent the judge.

Enclosure 6

[25] I shall now turn to the defendants' application (encl 6) which seeks to strike out the plaintiffs' writ and SOC under O 18 r 19(1)(a), (b) and (d) of the RHC. The application is premised on the grounds that:

(a) the plaintiffs' writ and SOC do not disclose any reasonable cause of action against the defendants;

(b) the plaintiffs' claim is scandalous, frivolous and vexatious and an abuse of the court process as the claim is obviously hopeless and unsustainable; and

(c) the plaintiffs' claim is scandalous, frivolous and vexatious as well as being an abuse of the court process as it is contrary to s 14 of the CJA.

Background Facts

[26] Briefly, the facts of this case, as gleaned from the plaintiffs' SOC dated 14 May 2005 are here set out. The plaintiffs obtained a default judgment on 25 October 2002 against Public Bank Bhd ('Public Bank') vide Civil Suit No D2–22–987 of 2002 for a sum in excess of RM14m. A noteworthy fact is that the judgment in default was stayed on 18 November 2002 until 24 April 2003 when the SAR set aside the default judgment, which decision was subsequently confirmed by the learned judge on 22 March 2005. The plaintiffs sought to enforce the said default judgment by way of a writ of seizure and sale on 15 November 2002. Pursuant to the execution process, Public Bank issued a bankers cheque in the name of the SAR Kuala Lumpur High Court for the sum adjudged rendering the writ of seizure and sale process unnecessary. The plaintiffs alleged that the first defendant who was on leave in Singapore gave the instructions via a telephone call to the SAR. The plaintiffs say that Public Bank subsequently stopped payment of the bankers cheque and they did not receive the default judgment sum. The plaintiffs hold the defendants, in particular the first defendant to account for their loss in having allowed Public Bank to play for time and delay the encashment of the bankers cheque. They alleged that the first defendant had wrongly interfered with the process of justice and execution and wrongly induced the bailiffs and the SAR to accept the bankers cheque when he had no business, duty, right or responsibility to do so. This has caused the plaintiffs' loss

and damage and they seek to recover the default judgment sum of RM14,362,312; RM10,000,000 as aggravated, punitive and exemplary damages together with interest thereon at 8%pa with effect from 25 October 2002; and costs from the defendants.

The Case Against The First Defendant

[27] As the affidavit in support of the defendants' application (Enclosure 6A) to strike out the plaintiffs' claim had not rebutted the following allegations they must be accepted by this court as factual. The facts being that:

(a) the first defendant had, at the request of Public Bank or its officers, solicitors or employees, telephoned and directed ('the act') the Deputy Registrar of the Kuala Lumpur High Court, namely, Encik Mohd Nordin bin Abdul Rauf — who was then in charge of the matter — to accept the bankers cheque No 147363 dated 15 November 2002, for RM14,362,212.00 in accord, settlement and satisfaction of the writ of seizure and sale vide Writ of Execution No AE 37–59–2002 dated 13 November 2002 (see SOC paragraphs 3–5, 11(a) and 12(a));

(b) the first defendant was on leave in Singapore at the material time of the act.

[28] A further material fact to be noted is that subsequent to the filing of the writ and SOC, the plaintiffs conceded that at the time of the act, the first defendant was the appointed head of the Civil Division of the Kuala Lumpur High Courts who was, inter alia, in charge of all matters pertaining to execution and attachment process including writs of seizure and sale in the Kuala Lumpur area. The above stated are the common factual grounds between the parties, and I have to be mindful that it is only within the bounds and circumscription of this factual matrix that this court should base it decision on encl 6.

Guiding Principles

[29] Before I start I must bear in mind the following two guiding principles, one, general and the other, specific, in relation to this application to strike out a claim under O 18 r 19(1) of the RHC. The general principle enjoins a judge not to import his personal feelings or extrapolate the realities of his judicial experiences or circumstances into the judicial making process in the case before him. The specific principle is that a plaintiff is entitled to a just and well considered determination of his cause before the judge even if his cause is against another brother judge named James Fong, James Bond or James Non.

[30] This application to strike out is largely grounded on s 14 of the CJA. Order 18 r 19(1) of the RHC read as follows:

19(1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement, of any writ in the action, or anything in any pleading or in the indorsement, on the ground that —

(a) it discloses no reasonable cause of action or defence, as the case may be; or

(b) it is scandalous, frivolous or vexatious; or

(c) …

(d) it is otherwise an abuse of the process of the Court;

and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

[31] In applications under this provision, I am bound by the decisions in a welter of high case authorities, for example, *Tractors Malaysia v Tio Chee Hing* [1975] 2 MLJ 1 and *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36, which enjoin the courts to exercise utmost caution if it is to deprive the plaintiffs their day in court, and to adopt the 'bound to fail' or 'obviously unsustainable' test. The cause celebre case for striking out applications is *Bandar Builder* where the Supreme Court held that the defendant must prove that the case is 'obviously unsustainable' and the fact that the case is 'weak and not likely to succeed at the trial is no ground for the pleading to be struck out'. This trite principle was also restated in *Pengiran Othman Shah bin Pengiran Mohd Yusoff & Anor v Karambunai Resorts Sdn Bhd (formerly known as Lipkland (Sabah) Sdn Bhd) & Ors* [1996] 1 MLJ 309 (CA) where it was held that the power is a drastic power which should be exercised only in plain and obvious cases (see also *Sim Kie Chon v Superintendent of Pudu Prison & Ors* [1985] 2 MLJ 385; *Haji Hussin bin Haji Ali & Ors v Datuk Haji Mohamed bin Yaacob & Ors* [1983] 2 MLJ 227; *Riches v Director of Public Prosecutions* [1973] 2 All ER 935; and *Drummond-Jackson v British Medical Association* [1970] 1 All ER 1094).

[32] In the case of *Gabriel Peter & Partners (suing as a firm) v Wee Chong Jin* [1998] 1 SLR 374, the Singapore Court of Appeal addressed the meaning of the phrase 'an abuse of the process of the court' (at p 384), in the following language:

> The term 'abuse of the process of the Court', in O 18 r 19 (1) (d), has been given a wide interpretation by the courts. *It includes considerations of public policy and the interests of justice.* This term signifies that the process of the court must be used bona fide and properly and must not be abused. The court will prevent the improper use of its machinery. It will prevent the judicial process from being used as a means of vexation and oppression in the process of litigation. The categories of conduct rendering a claim frivolous, vexatious or an abuse of process are not closed and will depend on all relevant circumstances of the case. A type of conduct which has been judicially acknowledged as an abuse of process is the bringing of an action for a collateral purpose… if an action was not brought bona fide for the purpose of obtaining relief but for some other ulterior or collateral purpose, it might be struck out as an abuse of the process of the court. (Emphasis added.)

[33] So, in my determination on encl 6, I have to keep in the forefront of my mind the cardinal principle that the plaintiffs should not be barred from their day in court unless their claim is bound to fail or is frivolous or vexatious or an abuse of court process. The pertinent points for consideration are twofold, namely, whether upon

the facts common to both sides: (a) the first defendant's act in respect of the said writ of seizure and sale under writ of execution ran foul of O 46 of the RHC; and, (b) that act was covered by judges' immunity under 14 of the CJA and common law. Thus, if even at this initial stage of the proceedings, it is clear from the undisputed facts and circumstances that issue (a) or (b) is resolved in favour of the first defendant, then this court should not allow the case to devolve through its slow process towards trial.

On the O 46 of the RHC Proceedings

[34] In my view, the plaintiffs are woefully wrong to maintain in their SOC that all monies collected by the sheriff pursuant to a writ of seizure and sale must be paid directly to them by Public Bank, the judgment debtor. Though O 46 of the RHC uses the expression 'writ of execution or distress' yet it clearly postulates that all payments on judgment sums must always be into court and this includes all monies collected by the sheriff pursuant to a writ of seizure and sale. This must be so for two reasons: the sheriff must be in the irrefutable position to collect his commission; and, only the sheriff is empowered to call off the writ of execution or writ of seizure and sale process.

[35] The relevant rules of O 46 of the RHC reads:

> r 13(3) Where the immovable property seized under a writ of execution or distress is sold by the sheriff *or he receives the amount of the levy without sale*, any sums of money deposited by the execution creditor must, so far as the monies coming to the hands of the sheriff will allow, be refunded to the execution creditor.
>
> ...
>
> r 17 *The proper officer receiving any money under any writ of execution* or distress must give for every sum so received a receipt.
>
> r 21 Subject to these rules … *any sum of money paid* by the sheriff to the credit of the execution creditor or *by the judgment debtor, under rule 17* shall, subject to any order of court, be paid to the execution creditor or judgment debtor respectively on his application without an order. (Emphasis added.)

[36] Thus, in the circumstances, the bankers cheque was rightly made out in favour of the SAR of the Kuala Lumpur High Court and accepted by the sheriff, rendering the writ of seizure and sale process unnecessary. In this context, it must be noted that the plaintiffs themselves had averred in para 9 of SOC that the bankers cheque cannot be revoked and is 'in law as good as gold'.

On Legitimate Expectation

[37] As this outrageous case had its genesis in the judgment in default of appearance taken on 25 October 2002 in Civil Suit No D2–22–987 of 2002, now let us examine what happened in that suit in the context of the plaintiffs' plea that they had a legitimate expectation that the bankers cheque would be honoured. The circumstances surrounding the procurement of the judgment in default of appearance was harshly criticised by the learned judge when dismissing the Plaintiffs' appeal in respect of the SAR's decision dated 24 April 2003, setting aside the default judgment. The judgment of the learned judge dated 22 March 2005 is tendered as exht 'MLTS-3' in encl 6A dated 6 June 2005. At pp 2–5 of the said judgment the learned judge said:

> … The judgment in default was entered based on a certificate of non-appearance but that certificate refers to an affidavit of service which does not comply with the Rules. What is of interest is the AR card in encl (8) which appears to be scribbled with cancellations of dates with no certainty as to when it was in fact sent. The matter is exacerbated when there is no evidence that the writ was in fact served on the defendant or its officers. One other dubious feature of this whole exercise is that exh MSY-2 is a letter purportedly from the post office which was addressed to the plaintiff's solicitor with no address of the said solicitor. … It is clear that the alleged service of the writ was not to the defendant's registered and principal office address. … *What is crucial also is that a default judgment cannot be entered for damages when there is no proof how those damages came about or are assessed.* … Be that as it may, this court finds that the defendant has amply shown that the judgment in default is irregular and that the defendant has defences on the merits. (Emphasis added.)

[38] This SOC is dated 14 May 2004, yet the pleadings failed to disclose the critical fact that on 18 November 2002 the court had ordered an interim stay of execution of the writ of seizure and sale until the disposal of the application for setting aside the default judgment (see exh 'MLTS-4' encl 6A). This interim stay is surely indicative that Public Bank as of now, need not pay and the plaintiffs are no longer entitled to the judgment debt including any monies already paid into court.

[39] Having lost their fight in Civil Suit No D2–22–987 of 2002 at the High Court level with bleak prospects of success in their appeal to the Court of Appeal against the decision of the learned judge on 22 March 2005 on the default judgment (upon study of exh 'MLTS-3' encl 6A which has indeed been stayed and which, I must observe, was obtained by quite irregular and peculiar means, they now intend to cut and extract their pound of flesh from the first defendant. Surely, as equity would say: they have not come to this court 'with clean hands'. On this unfortunate aspect of the case, I would hold that no litigant could or should be allowed to even whimper the principle of 'legitimate expectation' unless he has complied with the due process of the law and also has honestly disclosed the facts upon which such legitimate expectation is founded. Indeed, by filing the writ of seizure and sale, the plaintiffs were cynically attempting to steal a march on the expected application by Public Bank for a stay of the judgment in default; and a stay was indeed granted three days later on 18 November 2002. Also to be noted is that as of now, no judgment sum is due from Public Bank as the same had been set aside by the High Court, though appealed against. Thus, I am driven to observe that the plaintiffs have treated

the concept of justice and the judiciary with utter contempt when they instituted this instant suit, where they would not even yield to any benefit of the doubt — even if there are grounds for doubt, against a senior judge of the High Court. Why has this happened I may surmise. Did it in anyway stem out of some unfounded perception of the judiciary as a whole? It would certainly advance the cause of justice and the image of the judiciary if all judges, in the discharge of their judicial duties, adopt the resolve of Justice Bora Laskin, who, on being sworn as the Chief Justice of the United States Supreme Court, said:

> I would answer to no one and no power save my own conscience and the law..

[40] Now, for good measure let me move on to the rather heavy topic of judicial immunity

Judicial Immunity

[41] Section 14(1) of the CJA, a statutory enactment of an ancient English common law principle in respect of judicial immunity, states as follows:

> *No judge* or other person *acting judicially* shall be *liable to be sued* in any civil court *for any act done* or ordered to be done by him *in the discharge of his judicial duty*, whether or not *within the limits of his jurisdiction*, nor shall any order for costs be made against him, provided that he at the time in good faith believed himself to have jurisdiction to do so or order the act complained of.

Section 1 of the Judicial Officers Protection Act 1950 of India ('the Indian Act') is pari materia with s 14 of the CJA with regard to the issue of jurisdiction. The equipollent s 1 of the Indian Act provides:

> No Judge, Magistrate … Collector or other person acting judicially shall be liable to be sued in any Civil Court for any act done or ordered to be done by him in the discharge of his judicial duty, *whether or not within the limits of his jurisdiction: Provided that he at the time, in good faith, believed himself to have jurisdiction to do or order the act complained of.* (Emphasis added.)

[42] In *Anowar Hussain v Ajoy Kumar* AIR 1965 SC 1651, the Supreme Court of India had occasion to consider Section 1 of the Indian Act and held as follows:

> If the act done or ordered to be done in the discharge of judicial duties is within his jurisdiction, the protection is absolute and no enquiry will be entertained whether the act done or ordered was erroneously, irregularly or even illegally, or was done or ordered without believing in good faith, that he had jurisdiction to do or order the act complained of. *If the act done or ordered is not within the limits of his jurisdiction*, the judicial officer acting in the discharge of his judicial duties *is still protected, if at the time of doing or ordering the act complained of, he in good faith believed himself to have jurisdiction to do or order* the act. The expression *jurisdiction does not mean the power to do or order* the act impugned, *but generally the authority of the judicial officer to act in the matter.* (Emphasis added.)

[43] Courts in New Zealand, Canada and Australia have all applied the common law of England and also appear to have given a broad definition to the term 'jurisdiction' to mean the general authority of the judge in the matter.

[44] The leading case in England is *Sirros v Moore* [1975] 1 QB 118 at p 132 wherein Lord Denning MR, in dismissing an appeal by a plaintiff in an action claiming damages for assault and false imprisonment against a judge, deliberated at length the various aspects of the principle of judicial immunity, and expressed the following view:

> … it has been accepted in our law that no action is maintainable against a judge for anything said or done by him in the exercise of a jurisdiction which belongs to him. The words which he speaks are protected by an absolute privilege. The orders which he gives, and the sentences which he imposes, cannot be made the subject of civil proceedings against him. No matter that the judge was under some gross error or ignorance, or was actuated by envy, hatred and malice, and all uncharitableness, he is not liable to an action. The remedy of the party aggrieved is to appeal to a Court of Appeal or to apply for habeas corpus, or a writ of error or certiorari, or take some such step to reverse his ruling. Of course, if the judge has accepted bribes or has been in the least degree corrupt, or has perverted the course of justice, he can be punished in the criminal courts. That apart, however, a judge is not liable to an action for damages. The reason is not because the judge has any privilege to make mistakes or to do wrong. It is so that he should be able to do his duty with complete independence and free from fear. It was well stated by Lord Tenterden CJ in *Garnett v Ferrand* (1827) 6 B & C 611, 625. And I quote:
>
> > This freedom from action and question at the suit of an individual is given by the law to the judges, not so much for their own sake as for the sake of the public, and for the advancement of justice, that being free from actions, they may be free in thought and independent in judgment, as all who are to administer justice ought to be.

[45] And, at p 136, his Lordship further underscores the public policy reason behind judicial immunity in the following lucid language:

> … If the reason underlying this immunity is to ensure 'that they may be free in thought and independent in judgment', it applies to every judge, whatever his rank. Each should be protected from liability to damages when he is acting judicially. Each should be able to do his work in complete independence and free from fear. He should not have to turn the pages of his books with trembling fingers, asking himself: 'if I do this, shall I be liable in damages?' *So long as he does his work in the honest belief that it is within his jurisdiction, then he is not liable to an action.* (Emphasis added.)

[46] Indeed, the above lucid and potent words of Lord Denning MR has aptly articulated the very linchpin and sine qua non for the survival of the judiciary in any jurisdiction. In the same judgment, at p 141, I find Lord Buckley LJ saying:

> If the act was, or purported to be, a judicial act and was within the judicial powers of the judge, he is immune from civil liability. Public policy requires that the judge's conduct should not be impugned: … It is perhaps arguable that a judge, though acting within his powers, might be shown to have acted so perversely or so irrationally that what he did should not be treated as a judicial act at all. In such a case the remedy of his removal from office would be available. I doubt whether it would be in the public interest that his conduct should be open to debate in a private action.

[47] The Australian courts applied the same rationale and tests for judicial immunity. The reason advanced by counsel for the defendant in support of the claim for that relief is that a judge of a superior court is not liable to be sued in respect of acts done in the performance of his judicial duties. In *Gallo v Dawson* [1988] 82 ALR 401, the High Court of Australia struck out a suit brought against the defendant judge holding:

> The defendant … pursued an alternative ground, namely, that in any event the action was fatally flawed and should be … dismissed in the exercise of the inherent power of the court. The reason advanced by counsel for the defendant in support of the claim for that relief is that a judge of a superior court is not liable to be sued in respect of acts done in the performance of his judicial duties.
>
> In my opinion the point taken for the defendant is unanswerable. In the first place, the plaintiff's affidavit makes it plain beyond question that the conduct alleged against the defendant, assuming for the purposes of the present application that it occurred at all, was undertaken in the performance of his judicial duties. There is no suggestion that he lacked jurisdiction to perform the acts alleged against him. *In this context, 'jurisdiction' means the broad and general authority conferred upon a court to hear and determine a matter. It is authority to decide that is the test, not the mode of decision nor the manner in which the power has been exercised.* (Emphasis added.)

[48] In *Moll v Butler* [1985] 10 Fam LR 544, the Supreme Court of New South Wales was faced with an application to summarily terminate (similar to our O 18 r 19(1) of the RHC) the action brought against the defendant who as a judge of the Family Court of Australia had committed the plaintiff to prison for contempt of certain custody orders. The court struck out the action after finding that the defendant judge had jurisdiction to make the orders in question. That being so the judge was immune from action. The reasoning in Sirros v Moore as discussed above was applied.

[49] In the subsequent decision of *Harvey v Derrick* [1995] 1 NZLR 314 at p 324 ('*Harvey*'), Richardson J in the Court of Appeal re-emphasized the rationale behind judicial immunity:

> A range of public interest considerations has been advanced by Courts and commentators to justify judicial immunity. The primary grounds are that the public interest requires an independent judiciary free from the fear of vexatious personal actions and judicial immunity is necessary to protect the free and independent exercise of judgment in the public interest; that it is crucial in a democracy that Judges be perceived as fair and responsible and judicial immunity is necessary to preserve the dignity and respect of the judicial system as a whole; and that without a rule of judicial immunity it may become increasingly difficult to attract men and women of the highest character and ability to judicial office.

[50] And, on the term 'jurisdiction' it further held, at p 314, that:

> In the context of judicial immunity, *the term 'jurisdiction' means judicial power to hear and determine a matter, not the manner, method or correctness of the exercise of that power. 'Jurisdiction' is construed broadly, in order to prevent the issue of judicial immunity from hinging on the determination of fine question of jurisdiction, and under such a construction, a judge will not be held liable unless he acts without color of authority.* (Emphasis added.)

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[51] In *Nakhla v McCarthy* [1978] 1 NSLR 291 ('*Nakhla*') the plaintiff had sued a former President of the Court of Appeal on the following facts. The plaintiff's appeal and leave to appeal were dismissed by the Court of Appeal where the defendant presided. A written judgment was read out. Subsequently, the plaintiff's counsel discovered that there was no reference in that written judgment to a material ground of appeal. A motion was filed to set aside that judgment and praying for a rehearing. On the morning of the hearing of the motion, both counsel were called into chambers and were informed by the defendant that by reason of an administrative error a page which contained the relevant reference was omitted. Though the plaintiff's counsel refused to accept the additional page offered, the motion was withdrawn. The court went on to issue a memorandum making known the inadvertent omission. The plaintiff being dissatisfied commenced action against the defendant claiming damages for inter alia abuse of legal process. The defendant filed an application to strike out on the same grounds as the defendants' instant application in Enclosure 6.

[52] When allowing the application to strike out in *Nakhla*, this is what the Court of Appeal said in relation to 'acts done within the jurisdiction of the judge', at p 301:

> … that when the principle of judicial immunity is discussed in cases *in relation to acts done within the jurisdiction of the judge that word must be regarded as referable to the broad and general authority conferred upon his court and upon himself to hear and to determine issues* between individual or between individuals and the Crown. *What is of crucial importance for present purposes is that there is no further qualification that the immunity will disappear if the general jurisdiction of the court is exercised on some occasion in a manner which may lie or seem to lie, outside the conventional exercise of its power to hear and determine that sort of issues.* That is why in *Sirros v Moore*, Lord Denning MR in emphasizing the full extent of the immunity of a judge for anything said or done by him in the exercise of a jurisdiction which belongs to him, added: the orders which he gives, and the sentences which he imposes, cannot be made the subject of civil proceedings against him. *No matter that the judge is under some gross ignorance, or was actuated by envy, hatred and malice, and all uncharitableness, he is not liable to an action*. (Emphasis added.)

[53] Canadian judges enjoy both judicial immunity and judicial independence. These fundamental values are recognized and fully protected by the Constitution Act 1982 and the Canadian Charter of Rights and Freedoms. In *Taylor v Canada (Attorney-General)* [2000] 3 FC 298; [2000] FC Lexis 59, at Lexis transcript pp 5, 9 and 10, the Federal Court of Canada said that:

> Among the most important attributes that judges owe to the public are objectivity, independence and impartiality. These attributes must be protected and *any innovative legal principle which permits a litigant to invoke an administrative proceeding that encroaches on these attributes must be carefully scrutinized.* … Consider what might happen if judges could be regularly sued for decisions that stirred such disappointment *One potential consequence is that a certain end to disputes, one of the primary advantages of resolving disputes by resort to the courts, would never occur.* … Finally, the most serious consequence of permitting judges to be sued for their decisions is that judicial independence would be severely compromised. … *It is essential in all courts that the judges who are appointed to administer the law should be permitted to administer it under the protection of the law independently and freely, without favour and without fear. This provision of the law is not for the protection or benefit of a*

malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences. (Emphasis added.)

[54] So also in *Gallo v Dawson*, when Wilson J dismissed an action seeking damages in consequence of an alleged bias from a justice of the High Court, his Lordship applied *Sirros* for the doctrine of judicial immunity and took a broad construction of 'jurisdiction' in the following language:

> There is no suggestion that he lacked jurisdiction to perform the acts alleged against him. In this context, *'jurisdiction' means the broad and general authority conferred upon a court to hear and determine a matter. It is authority to decide that is the test, not the mode of decision nor the manner in which the power has been exercised.* (Emphasis added.)

[55] In the case of*Indian National Congress (1) v Institute of Social Welfare & Ors* [2002] 2 LRI 709 at Lexis transcript p 10, the Supreme Court of India in considering whether an election commission in the exercise of its powers, acts administratively or quasi-judicially, held:

> In this connection, the term 'judicial' *does not necessarily mean acts of a judge or legal tribunal sitting for the determination of matters of law, but for the purpose of this question, a judicial act seems to be an act done by competent authority upon consideration of facts and circumstances and imposing liability or affecting rights.* (Emphasis added.)

[56] In *Andersen v Gorrie* [1895] CA 668 at p 672, Kay LJ held:

> I take the law to be clear that for an act done by a judge in his capacity of judge he cannot be made liable in an action, even though he acted maliciously and for the purpose of gratifying private spleen.

[57] Justice Newman, in *FM v Singer* [2004] EWCA 793, also applied *Sirros* in holding that:

> A judge of a superior court is not liable for anything done by him while he is '*acting as a judge*' or '*doing a judicial act*' or '*acting judicially*' or '*in the execution of his office*' or '*quatenus a judge*'. What do all these mean? They are much wider than the expression '*when he is acting within his jurisdiction*'. I think each of the expressions mean a judge of a superior court is protected when he is acting in the bona fide exercise of his office and under the belief that he has jurisdiction, though he may be mistaken in that belief and may not in truth have any jurisdiction….he is protected if he in good faith believes that he has jurisdiction to do what he does. (Emphasis added.)

[58] From all the welter of case authorities, it is beyond question, and I would hold that s 14 of the CJA and common law afford complete immunity and protection to a judge from all civil liabilities for all judicial acts in cases registered or presided over or assigned to be dealt with by him. And, this immunity is extant even if the judge had acted 'under some gross error, or ignorance, or (his act) was actuated by envy, hatred and malice, and all uncharitableness …' or he is 'shown to have acted so perversely or so irrationally that what he did should not be treated as a judicial act

at all' (see *Sirros*, *Harvey*, *Nakhla* and *Taylor*). I am completely ad idem with Lord Buckley LJ that even if the judge is 'shown to have acted so perversely or so irrationally that what he did should not be treated as a judicial act at all' the remedy is his removal from office rather than to sue him in a private action which would not be in the public interest as judges should be able to do their work in complete independence and free from fear in having to perpetually ask the question: 'If we do this shall we be liable in damages?'

[59] Nevertheless, counsel for both the Bar and the AG's Chambers have been unable to locate any authorities where the judge had acted administratively outside his territorial jurisdiction and while on leave (as happened in the instant case). Be that as it may, after a careful study of s 14 of the CJA and the above cases from Commonwealth countries and through reasoning process, I am entirely satisfied, and I would hold that it is for very cogent reasons of public interest in having a functional judiciary that:

(a) the immunity accorded to judges under s 14 of the CJA and the common law should extend to all administrative acts and duties that the judge is required to perform from time to time; and,

(b) upon a broad-spectrum construction of the words 'for any act done or ordered by him to be done in the discharge of his judicial duty, whether or not within the limits of his jurisdiction … provided that he at that time in good faith believed himself to have jurisdiction to do or …' in s 14 of the CJA, I would hold that such immunity should extend to and cover administrative acts of the judge while out of Malaysia provided that it involves an administrative act which the judge is expected to do or assigned to perform while in Malaysia

[60] My reasons for so holding as in (a) and (b) above are here below set out.

Reasons for (a) above

[61] It could readily be gleaned from the above English, Australian, New Zealand and Canadian cases that the courts in Commonwealth jurisdictions have tied the issue of judicial capacity with that of jurisdiction and have held that judicial capacity is conterminous with jurisdiction. From the above authorities decided by eminent judges, it is clear that 'jurisdiction' relates to the capacity and authority of the judge to do the act. And, the term 'jurisdiction' has been construed in the broadest possible manner. Also, the manner, method or correctness of the exercise of that capacity and authority are not issues to be taken into consideration. It would follow that the words: "… for any act done by him in the discharge of his judicial duty, whether or not within the limits of his jurisdiction …" in Section 14 of the CJA should be read in the light of the following dicta:

(i) 'jurisdiction … must be regarded as referable to the broad and general authority conferred upon his court and upon himself …' in *Nakhla*;

(ii) 'the term 'judicial' does not necessarily mean acts of a judge or legal tribunal sitting for the determination of matters of law …' in *Indian National Congress*; and

(iii) '… not liable for anything done by him while he is 'acting as a judge' or 'doing a judicial act' or 'acting judicially' or 'in the execution of his office' or 'quatenus a judge' (which means the extent of his capacity as a judge – The Shorter Oxford English Dictionary on Historical Principles, Vol. II) … are much wider than the expression 'when he is acting within his jurisdiction" in *FM v Singer*.

[62] It is thus clear, and I would hold that common law and s 14 of the CJA, upon a wider construction, do confer immunity to a judge in respect of all administrative acts that he is required or assigned to perform as a judge, since such administrative acts are clearly within his judicial capacity of 'acting as a judge' or 'in execution of his office' or 'judicial duty' (in s 14 of the CJA), and should thereby also be deemed to be within his jurisdiction. In the same vein, in *Anowar Hussain,* the Supreme Court of India, have held that: "The expression jurisdiction does not mean the power to do or order the act impugned, but generally the authority of the judicial officer to act in the matter.

[63] The indemnity conferred under s 14 of the CJA must cover administrative acts, if we must have judges of law, some of whom, particularly the Chief Justice, the President of the Court of Appeal, the Chief Judge (Malaya), the Chief Judge (Sabah and Sarawak), and the principal judges of the Commercial and Civil Divisions Kuala Lumpur High Courts and the respective State High Courts, are required to carry out certain administrative duties as judges — must we only have politicians who, I must add, would still need good judges on their cause when they are in a fix. There is a real, strong public policy reason for judges to have immunity as in (a) above for otherwise, nobody in his right mind would become a judge. Take this present case, for example. The first defendant was sued for RM24,362,312 on what was essentially an administrative act that he was expected or assigned to perform as head of the Civil Division while in Malaysia, though he had acted while on leave in Singapore. Even if by some supernatural attributes a judge could live on mere water, fresh air and sunshine — so to say — the gross savings from this income for this 12 to 18 years of service on the bench would be insufficient to meet even a quarter of this sum claimed. Yes, compared to certain members of another profession who are able to rake in millions or hundreds of millions ringgit annually, good judges are indeed poor but yet resolutely proud souls 'for we rely on our conduct itself to be its own vindication' — per Lord Denning MR. Be that as it may, this is irrelevant musing. Should I hold otherwise, with, for example, this threat of a RM24m Sword of Damocles hanging over the head of judges, some of them would rather resign, especially if they are endowed with an innate analytical prowess in formulating and resolving the real issues, coupled with an ability to articulate them with a facile flow of precise language — such talents could be better employed elsewhere. If that happens, the hallowed expression 'he is a judge' could equally apply to a judge in a beauty contest. Surely the punch line of this judgment is that, for the reasons I have set out above, it would be completely untenable for this nation to have or maintain a feasible judicial system or institution should I hold that s 14 of the CJA affords no protection or immunity to a judge who performs administrative functions in the execution of his office powers or duties as aforesaid.

Reasons for (b) above

[64] My view in reason (b) above is grounded on: (i) the fact that there is no law either in the Federal Constitution or in any enactment which bars a judge of the High Court from making any administrative directions while out of the country; (ii) if there is such a provision in the law then there would also be a provision for the judge's 'stand-in', so to say, to carry on such administrative duties should the judge be out of the country; (iii) unless expressed law proscribes a judge from making any administrative directions while out of the country, the term 'jurisdiction', must logically follow the ratio in *Nakhla* which rightly held that that word must be regarded as 'referable to the broad and general authority conferred upon the judge', not only upon his court but also 'upon himself' and such judicial immunity will not be removed even 'if the general jurisdiction of the court is exercised on some occasion in a manner which may lie or seem to lie outside the conventional exercise of its power to hear and determine that sort of issues'. A judge who goes out of the country carries his judgeship with him. This is the reason why he is expected not 'to let his hair down' while overseas — he does not stop being a judge and transform himself into a libertine as soon as he leaves our shores even on a non judicial frolic of his own.

[65] In construing the following caveat in s 14 of CJA: 'provided that he at that time in good faith believed himself to have jurisdiction to do or order the act complained of', I find useful illumination in the dicta of Newman J, in *FM v Singer* who applied *Sirros*, and held that: '… a judge of a superior court is protected when he is acting in the bona fide exercise of his office and under the belief that he has jurisdiction, though he may be mistaken in that belief and may not in truth have any jurisdiction … he is protected if he in good faith believes that he has jurisdiction to do what he does'. Thus, even should I be wrong in holding as in (b) above, then I would, for three reasons, hold that the first defendant had at that time, in good faith, believed himself to have jurisdiction and powers to do the act complained of even though on leave in Singapore. My three reasons being:

(i) it is now accepted that the judge had no personal interest in the act;

(ii) he acted perforce in clearly, very urgent and exigent circumstances, and in any event he was not acting in the clear absence of all jurisdiction;

(iii) it was Public Bank or its officers or lawyers who had contacted the judge by phone in Singapore and he had only responded to the call and directed his officers, who were under his charge, to do the needful, which indeed, did not run foul of O 46 of the RHC. The fact that he had merely responded to the call speaks to the fact that he believed he was acting in faithful performance of his judicial duty as head of the Civil Division;

(iv) there was no other judge in his division — who was appointed to take charge in his absence — from whom Public Bank or its lawyers or officers could have sought directions.

[66] It is also to be noted that in many jurisdictions, there are cases where urgent applications are, in appropriate circumstances, heard and orders granted by telephone or from the judge's residence while on leave or medical leave. No issue has been taken in those cases as to the mode of the hearing and the orders granted (see *Allen & Ors v Jambo Holdings Ltd & Ors* [1980] 2 All ER 502 at p 503 and *Sevenoaks Securities Ltd & Anor v Clark International Finance NV* (1987) Lexis transcript.)

[67] Of pertinent consideration pertaining to my views in (b) above is that the functions and responsibilities of the head of the Civil Division – who is appointed by the Chief Judge Malaya – encompass, inter alia, all matters concerning execution of judgments under O 46 of the RHC (r 17 read with r 21), which he carries with him so long as he remains a sitting judge and as head of the Civil Division. It follows that Encik Mohd Nordin bin Rauf, as the Deputy Registrar of the Execution Division of the Kuala Lumpur High Court, who issued the relevant writ of seizure and sale, could not, at the material time, have taken and was indeed precluded from taking instructions from any of the other six judges of the division, other than the first defendant. Thus, I would hold that the first dDefendant had then acted, though on leave in Singapore, within the powers legally conferred upon him. See *Liability of the Crown* by Peter W Hogg — (2nd Ed, 1989) at p146.

[68] This civil suit is premised on three understated contentions, every single one of which is dismally amiss and flawed. It is only when the decision maker delve into the details and analyse the strands of the plaint itself that it could be torn to bits.

[69] The first contention being that: '… the first defendant had wrongfully interfered with the process of justice and execution and wrongly induced the employees, officers and agents of the second defendant to accept the said cheque when he had no business, duty, right or responsibility to do so.' The subsequent affidavits filed by both parties pursuant to this court's directions on this feature of the allegations confirmed that the first defendant was the head of the Civil Division of the Kuala Lumpur High Court, and as such head, he was in charge of all matters pertaining to the execution or attachment process in the Kuala Lumpur area. Thus, as he was in that position, it is obvious that the court officers were required to take his (or the CJM's) instructions and he is duty bound to instruct them, in such matters.

[70] The second contention that the judge had committed 'malfeasance, misfeasance, mala fide acts' and 'corrupt practice … contrary to s 15 of the Prevention of Corruption Act 1997' is the most emphatic display of spite and spleen. It has since been confirmed by plaintiffs' counsel that: 'there is no allegation that he (first defendant) had received any monetary or other favours …' and that 'there is no allegation in any of the plaintiffs' supporting affidavits or in the pleadings that he had any personal interest in the matter'.

[71] While the third being that his act was a mere administrative act, not within the powers legally conferred upon him and was performed while he was out of the country on holiday. I have already held that the phrase 'acting judicially … in the discharge of his judicial duty …' in s 14 of the CJA could clearly be construed to

provide immunity in respect of administrative acts of a judge so long as that act was done within the powers conferred upon or duties assigned to him, or he had, in good faith, believed himself to have such powers or is required to perform such duties.

Case Against Second Defendant

[72] In his written submission, counsel for the plaintiffs has displayed intellectual focus and a high command of the language but in the management of this case he has also revealed that within that focus, he is afflicted with a huge blind spot. It is obvious from the manner and format in which the writ was crafted and instituted that the plaintiffs had directed the claim against the second defendant under the vicarious principle of master and servant, to wit, the first defendant being the servant of the second defendant. It is noteworthy that not a single one of the second defendant's million-strong government servants has been sued in this action. The plaintiffs have in effect thereby sought to relegate judges to the position of government servants — is it, I wonder, a sign of the times or a consequence of the conduct of judges in general? This, I am not inclined to fathom. Their pleaded case against the second defendant is a serious affront against the doctrine (a word of far greater import than 'principle' or 'concept') of the separation of powers vis-à-vis the executive, the legislative and judiciary in a constitutional system. If some judges have conducted themselves (I am not saying that they have) such as to convey the perception that they are government servants, litigants who hold that false impression could hardly be faulted. Though, no doubt, no government in this rapidly globalised and interdependent market place would condone such a perception. It is beyond question that a judge is not a Government servant though he is as much a civil servant as a handmaiden or servant of the law. For the courts to hold otherwise would be tantamount to the judges themselves slavishly surrendering their judicial independence on a high altar of expediency. Indeed, as soon as our Prime Minister assumed office, he expressed his intention to demonstrate the principle of independence of the judiciary, and in the recent tour to attract foreign investments he assured potential fund investors that Malaysia has a good legal and judicial framework. Rest assured that because he clearly means what he has said he has the solid support of the people in his efforts to improve the public institutions. I would thus hold that there is absolutely no cause of action against the second defendant.

[73] I shall venture the following observation: considering that s 14 of the CJA (which merely reaffirms the position in common law) affords immunity to a judge in the performance of his function as a judge, while it is trite law that a judge is not an employee of the Government to make the latter liable for the judge's conduct, it is all the more imperative that a mechanism should be put in place to ensure objective and proper evaluation of a candidate proposed for judicial appointment so as to ensure that judges of the right calibre, competency, moral fibre and with a good grasp of the law (besides having a good command of the English language — if we are to remain relevant in a globalised world) are appointed and this would also obviate the embarrassment of having to experience any display of bizarre court judgments which go berserk on the law or conscience.

A **[74]** I am concerned. The very fact that a fanciful case of this nature saw the light of day is indeed perturbing. What has become of us? Has the Malaysian society metamorphosed into a violent, cynical society with scarce respect for the law and less respect for judges, to the extent that even a judge — as in the present case — who had merely carried out his administrative function within the powers conferred upon **B** him as head of his division has been treated with grave suspicion and accused of corruption; and is sued for well over RM24m? Have we, as judges, contributed to this state of affairs? Before we gripe about what has become of our society, we ourselves must not only show but also demonstrate our appreciation to the large number of good judges in our midst. It could be said, quite plausibly, that the best way to destroy a nation and its society is to first destroy the judicial institution — a soft **C** target, least capable of self preservation — and public perception of its credibility. Admittedly, the only way it could preserve itself is to ensure that only the very best in every sense of the word (as happened in the past) receive the call to serve; for otherwise even the good souls among them would cease to serve.

D **[75]** This is surely the first of such cases in the judicial history of Malaysia, at least when this case was filed; though, I am informed that there was another thereafter. What does it indicate and portend? Does it presage more such cases? I am embolden to observe that, say what you must, or should, or should not be said about the sad decline of our public institutions, by and large our judiciary now appears to the **E** people at large to be one of the most functional and credible institutions in the country. Indeed, the judiciary's public delivery system in terms of disposal of pre-2000 cases has also markedly improved. In this fast pace era of development which demands getting-straight-to-the-point art of communication (and this includes lawyers' submission), we should not be too modest to say 'we are better than **F** OK' if we are in fact so; 'Silence is not an option when things are ill done' — per Lord Denning. I should know, having managed the Commercial Division of the Kuala Lumpur High Court since answering the call while in Alor Setar, Kedah, to come over to head the Division about four and a halfyears ago. I am pleased to say that all the judges in my division are above board in the management of their cases. I am informed that, for very obvious reasons, this has been largely so since the **G** Commercial Division was formed many years ago. Unfortunately, some bad episodes and publicity some years ago have rendered us somewhat beleaguered. Thus, I am constrained to observe that, this case may have been designed to cause maximum embarrassment to the judiciary in general and the first defendant in particular with this scurrilous attack, and especially so considering that it was launched at the crucial **H** juncture in the first defendant's career when he was at last, about to achieve his long belated and well deserved promotion.

[76] If judges are not of the right moral fibre or do not have the courage to do what is right and conscionable and with vigour they would merely be parroting printed **I** words when taking their oath of office. For the sake of this land of our birth we must be prepared to bear the burden of carrying out our honoured duty, uncowed and unbowed, come what may upon ourselves — or rather, what may not come. To many the concept of justice is difficult to define even with carefully crafted words, but it simply means a judge's abiding desire to render to every citizen his due through the due process of the law; without fear or favour, with genuinely good conscience and

fealty to the law, and without any thought of self-aggrandisement, which, even if acquired, could save neither his name nor his soul. Least of all should a judge's conduct give any impression that he does not intend to reach the right decision. It does not matter how the courts of law are housed or what appellations are ascribed to such houses. No doubt, people with courage and character, especially if armed with a mighty pen, always seem sinister to the rest, but if the Nation cannot, through its judges, help the many who demand justice it cannot save the few who take more than their just deserts. Perhaps we should spend some time in quiet mulling of the following aphorism, which could be expressed in a somewhat sizzling and potent prose in the Malay language, thus:

Pendek kata, tak kan kau tak sayang nama kau

Tak kan harta pusaka kau tak ambil kira nama kau

[77] The words of the Honourable Mr Justice PN Bhagwati, an eminent jurist and the former Chief Justice of India, is often quoted by judges and the legal community for the simple reason that his courageous judgments are often articulated in felicitous and lucid prose which touches the hearts of those whose abiding passion is for justice and fair play. Let me assume the privilege of quoting his particularly potent passage from an article entitled *The Challenge to the Profession by the Judiciary* [1987] 2 CLJ 101 at p 103:

> Each attack on a judge for a decision given by him is an attack on the independence of the judiciary, because it represents an attempt on the part of those who indulge in such criticism to coerce judicial conformity with their own preconceptions and thereby influence the decision-making process. It is essential in a country governed by the rule of law that every decision must be made under the rule of law and not under the pressure of one group or another, no matter how sincerely motivated. If a judge is to be in fear of personal criticism by political or pressure groups or other individuals while deciding a case, it would most certainly undermine the independence of the judiciary.

[78] The perennial question: what is the proper route to take towards arriving at a fair and objective justice, is often moot. Do we first decide on what we feel the proper justice of the case should be and then construe the law to bring it within the ambit of what we have decided, or rather do we start without any conclusion but first ratiocinate and let the result or conclusion be a mere product of the process of interpretation of the law or logical thought. A very eminent and brilliant English jurist was known to sometimes adopt the former approach to achieve justice. I must reveal that, particularly in the case of *Boonsom Boonyanit v Adorna Properties Sdn Bhd* [1995] 2 MLJ 863, I had to wrestle with and agonise over the question of which approach to adopt, as in that case both parties were totally innocent vis-à-vis the law and fact, and it is axiomatic that in a court battle of rights no two opposing litigants could both succeed. It must be appreciated that therein I had also held that forgery had not been established upon the higher criminal standard of proof as required in cases of fraud. Both forgery and fraud are criminal in nature and until this day the highest court of our land has insisted on maintaining the higher standard of proof in civil cases on fraud (see *Yong Tim v Hoo Kok Chong & Anor* [2005] 3 CLJ 229). In that case I chose the latter approach, and left it to the legislature to resolve the

problem. Happily, in the instant case the statute and common law on the ambit of judicial immunity is as clear as white crystal.

[79] In the event, I would hold that the plaintiffs' action herein against both the defendants is bound to fail; is wholly bereft of any cause of action and is clearly scandalous, frivolous and vexatious and an abuse of court process. The plaintiffs' pleadings simply do not show any cause of action upon which any evidential foundation in support could be adduced. Here, I am entirely satisfied that the judge had acted with good conscience and promptitude given the severe exigent circumstances in time constraint that was foisted on him by the situation. This court has no alternative but not to allow this case to devolve and lumber through its slow process towards a wholly unwarranted trial. The whole action must be and is now struck out with costs to the defendants.

In Postlude

[80] I must express my appreciation to Dato' Mary Lim and her capable team for having put in several well researched and carefully structured written submissions with a good command of the English language. Such officers are, in as much as intellectually honest and competent judges are, a credit to the Nation. I have also to place on record this court's deep appreciation to the Bar Council for having so readily consented to address the court as an amicus curiae, and its representatives for having devoted their time in conducting extensive research on 'the ambit of judicial immunity'. I am indeed glad that the Bar has so promptly responded. We judges have reciprocated and treated their complaints without contempt. Whenever I receive any complaint about officers and members of the staff of my division I would immediately call for a meeting between my officers and representatives of the Bar. The only caveat placed on the meeting agenda is that the complaint should be only made bona fide coupled with constructive suggestions, if any, with a clear understanding that my officers and staff who, upon objective evaluation, have acted correctly or in good faith would be defended to the hilt. Mention must also be made of the fact that Mr Darshan Singh has conducted himself well within the bounds of proper court decorum in this case. It is this respect for the presiding judge by lawyers that augurs well for the judiciary.

[81] Yet nevertheless, in this outrageous case, I am driven to say that this action arising out of an entirely faultless act of the judge in carrying out the duties assigned to him as head of the Civil Division of the Kuala Lumpur High Court, is marked by serious errors, both in its inception and execution, and inspired by false perception of the health of the judiciary. It is so perverse, so baseless in terms of fact and law, and so clearly an abuse of court process, that I am most inclined to order that costs be borne personally by the instructing solicitor for the plaintiffs in this case. Nevertheless, as no issue has been taken by the defendants on this aspect of the case

— surely, the first of its kind in Malaysia — I shall not endeavour to formulate or craft the legal ratiocination for a decision but leave it for proper ventilation when this judgment is taken further on appeal.

Action struck out woth costs.

Reported by Loo Lai Mee